

Office of Chief Counsel
Internal Revenue Service

memorandum

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GWBezold

date: August 24, 1999

to: Chief, Examination Division, Midwest District
Attn: Kent Rinehart, E:EB-II:1213
Chief, Appeals Division, Midwest District
Attn: Tim Gukich

from: District Counsel, Midwest District, Milwaukee

ject: **Payment Requirement Under I.R.C. § 6703 Prior to Review by Appeals**

This memorandum responds to your request for advice regarding whether a taxpayer must satisfy the requirement contained in I.R.C. § 6703 of payment of a portion of the penalty proposed under I.R.C. § 6701 before the Appeals Division may acquire jurisdiction over the case.

The question arises in the examination of twelve different limited partnerships. Some of the partnerships have as few as [REDACTED] partners, while one or more have more than [REDACTED] partners. (We note that there appears to be at least five additional partnerships that may or may not be audited.) The Examination Division (Exam) proposes to disallow [REDACTED] dollars of [REDACTED] to these partnerships based on false claims to the credit. [REDACTED] is the promoter of these partnerships either directly or indirectly through other entities controlled by him. [REDACTED]'s general partner interest in the partnerships is minimal, approximately [REDACTED]%. Accordingly, the income tax effect to [REDACTED] is relatively small. Exam is also proposing I.R.C. § 6701 penalties against [REDACTED] in an amount ranging from approximately \$[REDACTED] to nearly \$[REDACTED] depending on which partnerships ([REDACTED] and [REDACTED]) are considered.

The information supporting both the income tax adjustments and the proposed penalty is intertwined. Both the proposed income tax adjustments and the proposed penalty should be considered by Appeals simultaneously. The results of the income tax examination are subject to deficiency procedures and can be considered by Appeals prior to assessment and collection.

Pursuant to I.R.C. § 6703(b), deficiency procedures do not apply to proposed I.R.C. § 6701 penalties. I.R.C. § 6703(c)(1)

provides that if a taxpayer pays, within 30 days of notice and demand, 15% of the proposed penalty and files a claim for refund, certain collection activities are suspended pending final resolution of the claim. To prevent collection of the balance of the penalty, the taxpayer must file his refund suit: 1) within a 30 day window after the expiration of a six months from the date of the taxpayer's filing of an administrative claim for refund; or 2) within 30 days after the claim is denied, if earlier. I.R.C. § 6703(c)(2). As can be seen, I.R.C. § 6703 provides extremely short time frames for a taxpayer's filing of his claim for refund and commencing a refund suit in court.

Regarding the I.R.C. § 6701 penalty, the Internal Revenue Manual (IRM) appears to imply the payment requirement of I.R.C. § 6703 must be satisfied prior to Appeals obtaining jurisdiction. See IRM §§ 4563.7, 48(13)2 at 733.1, 8(11)12, 8(11)21, 8(11)61. The IRM provides that Exam will review the claim for refund before granting administrative appeal rights. IRM § 4563.7(2). Though this may be a perfunctory review, since Exam proposed the penalty, depending on the submission by the taxpayer it may not. Even if Exam's review is perfunctory, Appeals may not have sufficient time to consider the case prior to the seven month deadline for filing a refund suit. As a result, the taxpayer may be denied review by Appeals and forced, perhaps prematurely, to file a suit in Court. We believe that an unsatisfactory outcome. In this case, the result is underscored by the required amount [REDACTED] would have to pay, between \$ [REDACTED] and \$ [REDACTED] or [REDACTED] % of his believed net worth.

Although the IRM sections listed above discuss some of the ways a taxpayer can protest a proposed or assessed penalty, they do not purport to present an exhaustive listing. Those sections also do not explicitly prohibit Appeals from considering an assessable penalty such as the I.R.C. § 6701 penalty prior to assessment. Accordingly, though the IRM appears to imply assessment and partial payment of the I.R.C. § 6701, we believe it does not preclude Appeals from considering the penalty prior to assessment. We suggest you request the authors of these IRM provisions to directly address the issue to clarify Service position and eliminate the perceived ambiguity in those provisions.

This advice was coordinated with the national office. If you have any questions or need further information, please contact me at (414) 297-4240.

(Signed) George W. Bezold

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